Supreme Court, U. S.
FILED
JAN 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

LESLIE H. ARPS
919 Third Avenue
New York, New York 10022

CLOYD R. MELLOTT
600 Grant Street
Pittsburgh, Pennsylvania 15219

PRESTON SHIRLEY
700 First Hutchings-Sealy
National Bank Building
Galveston, Texas 77550

Attorneys for Petitioners

INDEX

		Page
I.	THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT ISSUE OF CONTRIBUTION IN ANTITRUST CASES	2
II.	CONTRIBUTION IS APPROPRIATE FOR JUDICIAL RESOLUTION IN THE ABSENCE OF EXPRESS STATUTORY PROVISIONS	5
	A. Because The Antitrust Statutes Are Silent On Contribution, The Federal Courts Should Resolve The Issue	5
	B. The Federal Courts Give Shape To The Broad Mandate Of The Antitrust Laws By Drawing On Common-Law Tradition	6
	C. The Recent Senate Committee Proposal Has No Bearing On The Granting Of This Petition	7
III.	RESPONDENTS' ARGUMENTS ON THE MERITS OF CONTRIBUTION DO NOT SUPPORT DENIAL OF CERTIORARI	8
	A. Arguments On The Merits Of Contribution Are Premature	8
	B. Review Of The Important Issue Of Contribution In This Case Is Essential At This Time	9
CONCLUSION		10

CITATIONS

Cases:	Page
City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906)	7
Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974)	8
Funk v. United States, 290 U.S. 371 (1933)	5
Girouard v. United States, 328 U.S. 61 (1946)	5
Gomes v. Broadhurst, 394 F.2d 465 (3rd Cir. 1967)	8
Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979)	4
Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974)	4
Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979)	8
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	4, 5, 6
Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975)	8
Little Rock School Dist. v. Borden, Inc., 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979)	3, 4, 8
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)	6
Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted*, (Dec. 27, 1979)	3
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)	7
Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied*, (April 17, 1979)	2, 3, 4, 6, 7, 9
Reiter v. Sonotone Corp., 99 S.Ct. 2326 (1979)	5, 6
Rowe v. John C. Motter Printing Press Co., 273 F. Supp. 363 (D.R.I. 1967)	5
Transamerica Mortgage Advisors, Inc. v. Lewis, 48 U.S.L.W. 4001 (Nov. 13, 1979)	5
Troutman v. Modlin, 353 F.2d 382 (8th Cir. 1965)	5

Page

United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) 6

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897, *en banc rehearing denied*, 608 F.2d 524 (5th Cir. 1979), *petition for certiorari filed sub nom. Texas Industries, Inc. v. Radcliffe Materials Inc.*, No. 79-1144 (Jan. 24, 1980) 2, 9

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 7

Other Authority:

SENATE COMM. ON THE JUDICIARY, REPORT ON S.1468, THE ANTITRUST EQUAL ENFORCEMENT ACT OF 1979, S. REP. NO. 428, 96TH CONG., 1ST SESS. (1979) 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,
Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

This brief is submitted on behalf of petitioners in reply to the briefs[1] submitted in opposition to the Petition for a Writ of Certiorari. Respondents' arguments against granting

1. Two briefs were filed in opposition to the Petition:

(1) "Brief of Respondents-Plaintiffs in Opposition to Petition for a Writ of Certiorari" dated January 21, 1980 ("Pl. Br."), and

(2) "Brief in Opposition to Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit" dated January 21, 1980, filed by certain settling defendants-respondents ("Df. Br.").

In addition, settling defendants-respondents Weyerhaeuser Company and Willamette Industries, Inc. filed a "Response in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" dated January 18, 1980. Three settling defendants-respondents took no position on the Petition. For purposes of this Reply Brief, the term "respondents" does not include Weyerhaeuser, Willamette, and the three settling defendants which took no position.

certiorari are wholly without substance because as demonstrated below: (i) there is a clear conflict among the Circuits on the important issue of contribution in antitrust cases, (ii) contribution is appropriate for judicial resolution in the absence of express statutory provisions, and (iii) respondents' arguments on the merits of contribution support the granting, not the denial, of certiorari.

I.

THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT ISSUE OF CONTRIBUTION IN ANTITRUST CASES

The Circuit courts have expressly recognized the clear conflict on the issue of contribution in antitrust cases. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied*, (April 17, 1979) ("*Beauty Supply*"), the Eighth Circuit held:

> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tortfeasors in an antitrust action.

Beauty Supply, 594 F.2d at 1186.[2]

The conflict was established by the Fifth Circuit, where the court held to the contrary and stated:

> Although we have carefully considered the arguments set forth in the majority's opinion [in *Beauty Supply*], we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws.

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897, 900, *en banc rehearing denied*, 608 F.2d 524 (5th Cir. 1979), *petition for certiorari filed sub nom. Texas Industries, Inc. v. Radcliffe Materials, Inc.*, No. 79-1144 (Jan.

2. It is worth noting that plaintiffs-respondents simply excised this passage from the middle of their seventeen-line quotation from the decision, replacing the omitted passage with an ellipsis. *See* Pl. Br. at 3-4.

24, 1980) ("*Texas Industries*"). Similarly, in *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979), *en banc rehearing granted*, (Dec. 27, 1979), ("*Olson Farms*"), Judge Holloway stated in dissenting from the majority's rejection of contribution:

> To me, the sounder and more equitable conclusion was reached by the majority opinion in [*Beauty Supply*] which held, as a matter of federal law, that contribution may be awarded in antitrust actions.

Olson Farms, 1979-2 Trade Cas. ¶ 62,995, at 79,706 (citations omitted).

In a futile effort to demonstrate the absence of this conflict, respondents offer the following three fanciful interpretations of the Eighth Circuit's decision in *Beauty Supply*.

First: Respondents contend that *Beauty Supply* "created only a restricted cause of action for contribution under limited circumstances." (Df. Br. at 12-13; Pl. Br. at 3) This argument is contradicted by *Beauty Supply*, which, in holding that the district court improperly granted a motion to dismiss a third-party complaint seeking contribution from an alleged co-conspirator, established a general rule of contribution in antitrust actions. 594 F.2d at 1186.

Second: Respondents assert that the Eighth Circuit's rule is limited to monopoly cases where contribution is asserted against "nondefendants." (Df. Br. at 13; Pl. Br. at 2-3) This ignores the clear meaning of *Beauty Supply*. Thus, in *Little Rock School Dist. v. Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979) ("*Borden*"), a district court in the Eighth Circuit relying on *Beauty Supply* decided that

contribution was no less appropriate in price-fixing cases where settlements were involved.[3]

Third: Respondents indulge in speculation that the conflict "may be further diminished or even resolved in the near future by reason of the . . . Eighth Circuit's modification or revocation of this limited cause of action . . . ." (Df. Br. at 13) [4] However, respondents are unable to cite any appeals presently pending in the Eighth Circuit that challenge *Beauty Supply*. Nor is *Beauty Supply* likely to be overruled by the Eighth Circuit in view of the fact *en banc* rehearing was denied.

Accordingly, petitioners respectfully submit that in the light of well-established principles this Court should grant certiorari in order "to resolve a conflict among the Courts of Appeals." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977) (conflict concerning offensive use of pass-on in treble damage actions). *See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 208 (1979) (conflict concerning scope of "business of insurance" antitrust exemption); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 192-93 (1974) ("ostensible conflicts" concerning jurisdictional reach of the antitrust laws).

3. In sharp contrast to the position advanced in plaintiffs-respondents' brief, Stephen D. Susman, lead counsel for plaintiffs-respondents in the present case ("M.D.L. 310"), made the following statement to the court in the *Borden* case concerning the conflict among the Circuits, the importance of the contribution issue, and the likelihood that this Court would grant certiorari:

> Mr. SUSMAN: Because -- let me give the Court the chronology there. Two weeks ago the Fifth Circuit decided a contribution issue in Wilson Abraham v. Texas Industries precisely opposite the Eighth Circuit. There is a clear conflict between the circuits. That issue is going up to El Supremo soon. I imagine -- I know it's being taken up in the Abraham case because of the clear conflict where the Fifth Circuit says, "We decline to follow our brother on the Eighth Circuit." and because of the importance of the issue to the administration of antitrust litigation throughout the country. It seems to me the probability of the court taking that case is great.

Transcript of Conference in *Borden* (October 23, 1979) at 44.

4. Although respondents do not claim that there is any motion or request for certification pending in the *Borden* case, respondents offer the vague hope that the district court may certify under 28 U.S.C. § 1292(b) "at least some issues arising from the application of the Eighth Circuit's contribution rule in that case." (Df. Br. at 14, n. 17)

II.

CONTRIBUTION IS APPROPRIATE FOR JUDICIAL RESOLUTION IN THE ABSENCE OF EXPRESS STATUTORY PROVISIONS

Respondents contend that certiorari should be denied because (i) there is no statute expressly permitting contribution (Df. Br. at 6; Pl. Br. at 9), (ii) "Congress is far better suited to consider the wisdom of a cause of action for contribution" (Df. Br. at 5), and (iii) a bill (S.1468) which would establish contribution in price-fixing cases has been reported out of committee in the Senate (Df. Br. at 11; Pl. Br. at 7). [5] As demonstrated below, these contentions are totally without merit.

A. Because The Antitrust Statutes Are Silent On Contribution, The Federal Courts Should Resolve The Issue

Respondents assert, and petitioners agree, that there is no express provision concerning contribution in the antitrust statutes. (Df. Br. at 6; Pl. Br. at 9) Respondents argue that, for this reason, this Court cannot create a "new cause of action" for contribution. (Df. Br. at 8; Pl. Br. at 8) [6] However, it is precisely this absence of statutory provisions which makes the contribution issue appropriate for judicial review. *See Girouard v. United States*, 328 U.S. 61, 69 (1946); *Funk v. United States*, 290 U.S. 371, 381-82 (1933).

Respondents incorrectly cite *Reiter v. Sonotone Corp.*, 99 S.Ct. 2326 (1979) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977) in support of their proposition that this Court should not decide antitrust issues not specifically addressed by Congress. (Df. Br. at 6-9; Pl. Br. at 7)

5. No further action on S.1468 has been taken, and no counterpart has been introduced to date in the House of Representatives.

6. Contribution is not a "new cause of action", but on the contrary is only a *derivative* claim. *See, e.g., Troutman v. Modlin*, 353 F.2d 382, 386-87 (8th Cir. 1965); *Rowe v. John C. Motter Printing Press Co.*, 273 F. Supp. 363, 365 (D.R.I. 1967). Accordingly, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 48 U.S.L.W. 4001 (Nov. 13, 1979) (Pl. Br. at 10; Df. Br. at 8), which deals only with non-derivative causes of action is not applicable here.

Reiter does not support respondents' position because in that case the Court's holding was compelled by "the plain language" of the statute. 99 S.Ct at 2334. Thus, the Court disregarded what it termed the "ruinous effect" of antitrust consumer class actions on small businesses. *Id.* Similarly, in *Illinois Brick*, this Court did not, as respondents contend, hold that indirect purchaser lawsuits were impermissible because Congress had not authorized them. Rather, the Court decided the merits on non-statutory grounds after concluding that no statutory provision governed. 431 U.S. at 733-34, n. 14.

B. The Federal Courts Give Shape To The Broad Mandate Of The Antitrust Laws By Drawing On Common-Law Tradition

Congress long ago delegated to the federal courts the responsibility for developing the antitrust laws. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), this Court observed:

> Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

Id. at 688 (footnote omitted). *Accord, Beauty Supply*, 594 F.2d at 1183; *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) ("Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.")

In keeping with their role of shaping the development of antitrust doctrine, federal courts have resolved issues, similar to contribution, concerning the allocation of damages and responsibility under the antitrust laws. For example, the application of joint and several liability to antitrust

cases, which respondents mistakenly attribute to Congress (Pl. Br. at 7), was judicially established in *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) (effect of releases);[7] *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (rejecting *in pari delicto* defense).

C. The Recent Senate Committee Proposal Has No Bearing On The Granting Of This Petition

The pendency of S.1468 (*see* footnote 5, page 5) should not be considered by this Court in exercising its certiorari jurisdiction. In view of the literally thousands of bills introduced in Congress each session which are not passed, and the difficulty of predicting the enactment of any one bill, petitioners respectfully submit that the possibility of some future legislation establishing contribution and eliminating the conflict is of no relevance whatsoever to this Petition.

Indeed, the Senate Judiciary Committee's Report on S.1468 clearly indicates that the full Committee recognized that the contribution issue is both ripe and proper for this Court's review. For example, in the Supplemental Views of Senators Metzenbaum and Kennedy, it was stated:

> [T]he contribution issue is ripe for Supreme Court review through writ of certiorari. The Supreme Court in the near future may well provide the necessary guidance to the federal courts for flexible and fair application of a contribution rule in antitrust cases.

SENATE COMM. ON THE JUDICIARY, REPORT ON S.1468, THE ANTITRUST EQUAL ENFORCEMENT ACT OF 1979, S.

7. In *Zenith*, the Court also reaffirmed the principle that plaintiffs are not permitted to obtain a double recovery. 401 U.S. at 348. Thus, contrary to respondents' assertion (Pl. Br. at 5-6), *Zenith* is not inconsistent with applying contribution in antitrust cases. *See Beauty Supply*, 594 F.2d at 1184.

REP. NO. 428, 96TH CONG., 1ST SESS. 29 (1979) ("Committee Report").[8]

In conclusion, there is nothing unique about contribution which would militate against judicial resolution of the issue. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (adopting contribution for admiralty cases); *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979) (federal securities fraud cases); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (air disaster cases); *Gomes v. Broadhurst*, 394 F.2d 465 (3d Cir. 1967) (negligence cases).

III.

RESPONDENTS' ARGUMENTS ON THE MERITS OF CONTRIBUTION DO NOT SUPPORT DENIAL OF CERTIORARI

Respondents argue (i) contribution interferes with deterrence, settlements, competition and manageability, and (ii) review of the contribution issue in M.D.L. 310 is inappropriate at this time. Neither of these arguments justifies denying certiorari.

A. Arguments On The Merits Of Contribution Are Premature

Numerous arguments on the merits of contribution are raised by respondents, including the effects of contribution on (i) deterrence (Pl. Br. at 4-5), (ii) settlements (*id.* at 6)[9], (iii) competition (*id.* at 11), and (iv) manageability of complex antitrust lawsuits (*id.* at 5). It is obvious that

8. These remarks were omitted from the excerpts of the Report attached to respondents' appendices. *See* Pl. Br. at App. A; Df. Br. at App. H.

9. Among the many misstatements in respondents' briefs are the following. First, the statement that no plaintiff would enter into settlements with "less solvent" defendants if the courts recognized claim reduction, and that courts would never approve such hardship settlements (Pl Br. at 6, n. 3), is, to quote plaintiffs-respondents, "blatantly untrue." (*Id.* at 12, n. 9) In *Borden*, which recognized claim reduction, class plaintiffs represented by Stephen D. Susman, also lead counsel for plaintiffs in M.D.L. 310, entered into a "financial hardship" settlement (Transcript of Conference in *Borden* (October 23, 1979) at 26) which has been preliminarily approved by the district court. (Order preliminarily approving settlement dated January 14, 1980)

(footnote continued on following page)

there are sharp disagreements concerning each of these issues. *Compare Beauty Supply*, 594 F.2d 1179, *with Texas Industries*, 604 F.2d 897. These issues can be resolved only by granting certiorari because denial of certiorari leaves the conflict standing. Therefore, petitioners will not burden this Court with arguments in this brief on "merits" issues.

B. Review Of The Important Issue Of Contribution In This Case Is Essential At This Time

The District Court dismissed petitioners' cross-claims with prejudice and entered final judgment thereon. Pretrial Order No. 13, ¶ 1 (Petition at E-1). Thus, respondents err in suggesting that this Petition be denied because "review should await the full termination of the litigation in the District Court." (Pl. Br. at 13)[10]

It is unquestioned (*see* footnote 3, page 4 and Committee Report) that contribution is currently among the most critical unsettled issues in antitrust law. The importance of this issue alone justifies the granting of the writ. *See* Petition at 10-14.

Unless this Court acts, the question of contribution as asserted in the cross-claims will have been finally decided[11] adversely to the petitioners, and the law of the Fifth Circuit will continue to be no contribution in antitrust cases.

(footnote continued from preceding page)

Second, the statement that "There is thus no substance to Petitioners' claims that any innocent party [in M.D.L. 310] was forced to settle" (Pl. Br. at 12, n. 9) is also untrue. The Continental Group settled for $27.5 million even though the jury in the related criminal case found it to be innocent. (Petition at 12; *id.* at App. D)

10. Furthermore, in stating that certain defendants have already "notified" the district court that they will seek rescission of their settlements if contribution is allowed (Df. Br. at 5, 16), respondents disregard the present status of M.D.L. 310. In fact, the District Court has given final approval to the settlements and overruled the objection of certain settling defendants that final approval should be withheld until the contribution issue is resolved. Memorandum Order and Opinion of December 21, 1979 (S.D. Tex. 1979) (Pl. Br. at B11-12). Df. Br. at B-1 *et seq.* omits this portion of the District Court's order.

11. Contrary to Df. Br. at 4, no petition for rehearing or rehearing *en banc* by any party in M.D.L. 310 authorized to seek such relief is pending in the Fifth Circuit.

CONCLUSION

For the reasons stated herein and in the Petition, a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Dated: January 30, 1980

Respectfully submitted,

Of Counsel:
KENNETH A. PLEVAN
SHEPARD GOLDFEIN
RICHARD M. SCHWARTZ

THOMAS R. LONG
RALPH R. FERNEY

LESLIE H. ARPS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 371-6000
Attorneys for Petitioner Westvaco Corporation

Of Counsel:
J. GARY KOSINSKI
RAY C. STONER
MICHAEL R. BORASKY

CLOYD R. MELLOTT
ECKERT, SEAMANS, CHERIN & MELLOTT
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000
Attorneys for Petitioner Georgia-Pacific Corporation

Of Counsel:
JERRY P. FORTENBERRY
E.J. KENN

PRESTON SHIRLEY
MILLS, SHIRLEY, MCMICKEN & ECKEL
700 First Hutchings-Sealy National Bank Building
Galveston, Texas 77550
(713) 763-2341
Attorneys for Petitioner Packaging Corporation of America